(2)

No. 05-948

In the Supreme Court of the United States

RICHARD M. SIMKANIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court directed a verdict on an element of the offense under 26 U.S.C. 7202.

2. Whether, in a prosecution for criminal tax offenses, the district court abused its discretion in deciding not to give petitioner's proposed instruction on good faith, where the court had already covered the substance of that instruction when it instructed the jury on willfulness.

3. Whether the district court violated the First Amendment when it determined, based in part on petitioner's avowed beliefs, that he was likely to recidivate and therefore should be given a longer sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 420 F.3d 397.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2005. A petition for rehearing was denied on October 27, 2005 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on January 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on ten counts of willfully failing to collect and pay over employment taxes, in violation of 26 U.S.C.

7202, 15 counts of knowingly making and presenting false claims for refund of employment taxes, in violation of 18 U.S.C. 287 and 2, and four counts of failing to file federal income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to 84 months of imprisonment. Pet. App. A1-A2.

1. Section 7202 of the Internal Revenue Code provides that "[a]ny person required [under Title 26] to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution." 26 U.S.C. 7202.

In *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), this Court interpreted the term "willfully," for criminal tax offenses, to mean "a voluntary, intentional violation of a known legal duty." *See United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam) (reaffirming that standard). In *Cheek* v. *United States*, 498 U.S. 192, 202 (1991), the Court elaborated that "the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable."

The definition of "willfulness" in criminal tax statutes—"a voluntary, intentional violation of a known legal duty"—is an exception to the general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution. *Cheek*, 498 U.S. at 199-201 (quot-

ing *Bishop*, 412 U.S. at 360). The basis for the exception, the Court observed, was that in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Id.* at 205 (internal quotation marks and citations omitted.)

Consistent with that rationale, the Court held in *Cheek* that a defendant who knows what the law requires and who merely disagrees with it does not present a good-faith defense. 498 U.S. at 202. The Court further held that "[c]laims that some of the provisions of the tax code are unconstitutional" cannot constitute a good faith defense, because such claims "do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code," but from "a studied conclusion, however wrong, that those provisions are invalid and unenforceable." *Id.* at 205-206.

2. Beginning in January 2000, petitioner stopped withholding employment taxes from the wages of workers employed by his company, Arrow Custom Plastics, Inc. Pet. App. A5. He also filed claims for refund with the IRS, claiming a refund not only of the employment taxes previously paid by Arrow, but also the employment taxes that Arrow collected from its employees and paid to the IRS. *Id.* at A4. During his trial, petitioner testified that he stopped withholding taxes because he came to believe the following: (a) that "the Constitution provides for two types of taxes—a direct tax and an indirect tax"; (b) that, according to *Brushaber* v. *Union Pacific Railroad*, 240 U.S. 1 (1916), the income tax is an indirect tax; (c) that a person's labor is his own property and cannot be subject to an indirect tax; and (d) that the

wages a person receives for his labor are not subject to the income tax. Petitioner also stopped paying his own income taxes. Pet. App. A7.

In August 2003, a superseding indictment was returned charging petitioner with 12 counts of willfully failing to collect and pay over employment taxes, in violation of 26 U.S.C. 7202, and 15 counts of filing false claims for tax refunds, in violation of 18 U.S.C. 287. The parties filed a plea agreement in which petitioner agreed to plead guilty to four counts, but the agreement misstated the maximum penalty and the parties were not thereafter able to reach a new plea agreement. Pet. App. A6.

Supporters of petitioner were in front of the courthouse before the beginning of jury selection, handing out pamphlets supporting jury nullification. After a juror contacted the court's staff to express concern about the behavior of petitioner's supporters and one member of the jury, it was revealed that some jurors had been contacted by petitioner's supporters. The trial resulted in a mistrial by reason of the jury's inability to reach a unanimous verdict. Pet. App. A6.

In December 2003, a second superseding indictment was returned, which added four counts of failure to file individual income tax returns, in violation of 26 U.S.C. 7203. This time, security measures were taken to prevent petitioner's supporters from contacting members of the jury pool or the jurors selected for the case. Pet. App. A7 n.2. The jury returned a verdict of guilty as to 28 counts, but indicated that it did not want to deliberate further on two of the twelve counts charging willfully failing to collect and pay over withholding taxes from employees in violation of Section 7202. *Id.* at A7, A9.

The district court accordingly declared a mistrial as to those two counts and then dismissed them. *Id.* at A9.

The court determined that petitioner's criminal history category under the Sentencing Guidelines was I and his offense level was 22, with a corresponding sentencing range of 41-51 months of imprisonment. At the sentencing hearing, petitioner advised the court that he still "firmly believed" that "the wages of a laborer are withheld through fraud" and that it was "fundamental law" that the "wages of a laborer are withheld through fraud" under the Bible, the Declaration of Independence, and the Constitution. Pet. App. A42.

The district court departed upward from the 41-51 month sentencing range and sentenced petitioner to 84 months of imprisonment. The court explained that the upward departure was warranted, *inter alia*, because petitioner "ha[d] displayed contempt and disrespect for the laws of the United States of America, the State of Texas, and the city of Bedford" and had a "cult-like belief that the laws of the United States do not apply to [him]." Pet. App. A32-A33. The court further noted that petitioner's "beliefs ha[d] led him to act in a manner inconsistent with the laws of the United States (ranging from giving up his driver's license, threatening to kill federal judges, and failure to comply with the federal tax laws)." *Id.* at A33; see *id.* at A33 n.16 (noting that petitioner had said at a meeting that "I think we need to knock off a couple of federal judges. That will get their attention."). The court concluded that it was "satisfied that [petitioner] would continue to act on those beliefs in the future" and that "it is likely that he will commit future tax-related crimes." *Id.* at A33. Because petitioner's "likelihood to recidivate most closely resembles that of defendants whose criminal history category is

VI," the court imposed a sentence at the bottom end of the 84-105 month Guidelines sentencing range applicable to defendants with petitioner's offense level and criminal history VI. *Id.* at A34.

3. The Fifth Circuit affirmed both the convictions and the sentence. Pet. App. A1-A44.

a. The court rejected (Pet. App. A9-A21) petitioner's argument that the district court, when providing a supplemental instruction in response to a note from the jury, directed a verdict in favor of the prosecution with respect to an element of the offense. In its note, the jury alluded to testimony by petitioner that a reason for his failure to withhold taxes from Arrow's employees was that Arrow did not operate in any industry, or perform any activities, specifically mentioned in the 7000 pages of the Internal Revenue Code. The jury asked:

> Since no proof has been made that the defendant and his employees are in an occupation listed in those 7,000 [pages], are we to conclude that they are in fact, not in that 7,000, or do we need to read all 7,000 to see what the defendant was referring to, and in fact, wasn't listed in the 7,000[?]

Id. at A12-A13.

The district court responded:

> You are instructed that you do not need to concern yourself with whether defendant's employees are in an occupation "listed in those 7,000." The Court has made a legal determination that within the meaning of [26 U.S.C. 7202], during the years [1997-2002], [Arrow], through its responsible officials, had a legal duty to collect, by withholding from the wages of its employees, the employees' share of the social security taxes, Medicare taxes, and federal income taxes,

> and to account for those taxes and pay the withheld amounts to the United States of America. You are to follow that legal instruction without being concerned whether there are certain employers who are not required to collect and withhold taxes from the wages of their employees.

Pet. App. A13-A14. Petitioner objected to that instruction. *Id.* at A14.

The court of appeals rejected petitioner's argument that the response to the jury "constituted a directed verdict on [an] element of the offense, which was uncontested at trial—namely, the requirement that Arrow was an employer that paid wages to its employees." Pet. App. A17. The court held that petitioner's "reading of the court's response, while plausible in a literal sense, is entirely divorced from a reading of the instructions as a whole, as well as from the context in which the jury asked its question and the court responded." *Ibid.* The court of appeals explained that the district court had already "instructed the jury at least twice that, in order to convict [petitioner] under § 7202, it must determine beyond a reasonable doubt that Arrow was an employer that paid wages to its employees," and that the court, when it responded to the jury's question, had "reminded the jury to consider all the other instructions that had been given." *Id.* at A18. In those circumstances, the "district court's answer was reasonably responsive to the jury's question and was a correct statement of the law—it instructed the jury that whether or not Arrow's business activity appears on a list in the [Internal Revenue Code] is irrelevant to whether [petitioner] had a legal duty to withhold." *Id.* at A18-A19. The court concluded that there was "no error in the district court's response to the jury note." *Id.* at A19.

The court added that, "even if we were to conclude that the district court's response to the jury note was erroneous, which we do not, we still would not reverse on this ground." Pet. App. A19. The court held that, had there been an error, it would have been "harmless beyond a reasonable doubt." *Ibid.* (citing *Neder* v. *United States*, 527 U.S. 1 (1999)). The court observed that "[d]uring the course of the trial, defense counsel introduced no evidence that Arrow was not an employer that paid wages to its employees, and defense counsel did not argue or otherwise suggest during the trial that the prosecution had not established this element beyond a reasonable doubt." *Id.* at A20. The court accordingly held that "it would have been irrational" for the jury to "decide[] that the government's evidence, although uncontradicted, did not establish that element beyond a reasonable doubt." *Id.* at A20-A21.

b. The district court instructed the jury on the "willfulness" element that "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." Pet. App. A21. The court instructed, with respect to the Section 7202 and 7203 counts, that to establish willfulness the government had to prove that petitioner "knew of the requirements of federal law" and "voluntarily and intentionally caused [Arrow] to fail to comply with these requirements." *Id.* at A21-A22 (Section 7202 counts); *id.* at A22 (similar on Section 7203 counts). The court instructed the jury with respect to the Section 287 counts that the government had to prove that petitioner "knew that the claim" he was presenting "was false or fraudulent" and that his acts were "done voluntarily and intentionally, not because of a mistake or accident." *Ibid.*

On appeal, petitioner argued that the district court had erred in failing also to instruct the jury specifically on his good-faith defense. The court of appeals explained that the district court had "adequately instructed the jury on the meaning of willfulness," as articulated in *Pomponio*, 429 U.S. at 12, and *Cheek*, 498 U.S. at 202. Pet. App. A25. The court also noted that petitioner's "requested instruction was 'substantially covered in the charge given to the jury' regarding willfulness." *Ibid.* The court concluded that, "taken together, the trial, charge, and closing argument laid the theory of the defense squarely before the jury, and the lack of the requested instruction did not seriously impair [petitioner's] ability to present effectively his good-faith defense." *Ibid.*

c. The court of appeals held that in upwardly departing from the Sentencing Guidelines range, the district court did not err in considering petitioner's "specific beliefs that the tax laws are invalid and do not require him to withhold taxes or file returns (and his association with an organization that endorses the view that free persons are not required to pay income taxes on their wages)," because those factors were "directly related to the crimes in question and demonstrate a likelihood of recidivism." Pet. App. A39. The court further held that the extent of the upward departure was reasonable, citing the district court's determination that petitioner's "membership in a group with radical views rejecting the laws of the United States and his professed beliefs that he is not required to abide by the tax laws

would lead him to commit other tax-related crimes." *Id.* at A43.[1]

ARGUMENT

1. Petitioner argues that the court of appeals erred in its application of the harmless error rule of *Neder* v. *United States*, 527 U.S. 1, 18-19 (1999), to the district court's reply to the jury's question about the need to consider whether Arrow was in a business specifically mentioned in the Internal Revenue Code. Because the court of appeals found that no error was committed in the district court's reply, the court's alternative holding, in which it determined that any error would have been harmless, is not squarely presented by this case. In any event, the court's application of the harmless-error rule to the specific facts of this case was correct and would not warrant review.

a. The court of appeals unambiguously "f[ou]nd no error in the district court's response to the jury note." Pet. App. A19. The court noted that a challenged "instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Id.* at A15 (quoting *Estelle* v. *McGuire*, 502 U.S. 62, 72 (1991) (internal quotation marks omitted)). Applying that standard, the court determined that petitioner's argument that the district court's response improperly directed a verdict on an element of the offense was "entirely divorced from a

[1] Petitioner was sentenced before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). The court of appeals rejected his argument that the case should therefore be remanded for resentencing, holding that the district court's use of facts not found by the jury to enhance his sentence was not plain error. Pet. App. A43-A44. Petitioner does not renew his *Booker* challenge in this Court.

reading of the instructions as a whole, as well as from the context in which the jury asked its question and the court responded." *Id.* at A17. After a careful review of the instructions as a whole and the entire context of the district court's response, see pp. 6-8, *supra*, the court of appeals concluded that "there was not a reasonable likelihood that the jury applied the instruction as if it were a directed verdict on [an] element of the offense," as petitioner had argued. *Id.* at A19.

The court of appeals correctly rejected petitioner's argument that the district court's response to the jury was error. See Pet. App. A9-A19. Petitioner does not seek further review of that holding, see Pet. i, and the court of appeals' fact-bound conclusion on that point would not in any event warrant further review. Because that holding was sufficient to dispose of petitioner's claim of error, further review is not warranted to consider the court of appeals' further, and alternative, holding that any error, had it been committed, would have been harmless.

b. In any event, the court of appeals correctly concluded that the error identified by petitioner, had it occurred, would have been harmless. In addition to the evidence submitted by an IRS employee and referred to by petitioner (see Pet. 17), the government introduced evidence that Arrow had filed documents with the Texas Workforce Commission that both substantiated the amount of wages paid to Arrow's workers and represented that the workers were employees. Gov't C.A. Br. 30. Petitioner never challenged that evidence or presented any evidence that the workers were independent contractors (and thus not subject to withholding tax), rather than employees. Petitioner did contend that only government workers were employees under 26 U.S.C.

3402, which provides for deducting and withholding income tax on wages paid to employees. See Gov't C.A. Br. 43-44. But that mistaken contention of law did not provide any basis for a jury to find that Arrow's workers were not employees. The court of appeals therefore correctly concluded "that it would have been irrational" for the jury to "decide[] that the government's evidence, although uncontradicted, did not establish that element [*i.e.*, that Arrow was an employer that paid wages to its employees] beyond a reasonable doubt." Pet. App. A20-A21. And in any event, the factbound question whether the court of appeals' harmless-error discussion correctly analyzed the evidence in this particular case would not warrant further review.

2. Petitioner argues (Pet. 22-25) that the court of appeals' conclusion that he was not entitled to a specific instruction on good faith conflicts with decisions of the Second and Eleventh Circuits. The court of appeals correctly upheld the district court's refusal to give the proposed instruction, and further review of that determination is not warranted.

a. In *United* States v. *Pomponio*, 429 U.S. 10 (1976) (per curiam), this Court reaffirmed that, in the context of criminal tax cases, "willfulness * * * simply means a voluntary, intentional violation of a known legal duty." *Id.* at 12; see *Cheek* v. *United States*, 498 U.S. 192, 201 (1991); *United States* v. *Bishop*, 412 U.S. 346, 360 (1973). Here, the jury was correctly instructed that in order to find that petitioner acted willfully, it was required to find that petitioner "act[ed] voluntarily and deliberately and intending to violate a known legal duty." Pet. App. A21. Accordingly, the instructions adequately conveyed to the jury the definition of willfulness and what the gov-

ernment was required to prove in order to establish willfulness.

Petitioner contends (Pet. 22-25) that, even if the jury was correctly instructed on the willfulness element of the tax offenses with which he was charged, he was nonetheless entitled to a separate instruction that his conduct was not willful if he acted because of a good faith misunderstanding of the requirements of the law. That contention is mistaken.

It is well settled that although "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," *Mathews* v. *United States*, 485 U.S. 58, 63 (1988), a defendant is not entitled to an instruction using his exact words. A refusal to include a requested instruction is reversible error only if the requested instruction is substantially correct, the actual charge given the jury did not substantially cover the content of the proposed instruction, and the omission of the proposed instruction seriously impaired the defendant's ability to present a defense. See *United States* v. *Pettigrew*, 77 F.3d 1500, 1510 (5th Cir. 1996).

The actual charge given the jury in this case substantially covered the content of petitioner's proposed instruction. Any jury that found that petitioner "act[ed] voluntarily and deliberately and intending to violate a known legal duty," Pet. App. A21, as the court's instructions required, would necessarily have rejected the conclusion that petitioner acted with a good-faith misunderstanding of the requirements of the law. As this Court observed in *Cheek*, 498 U.S. at 202, "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." Since the substance of the good-

faith defense was covered by the willfulness instruction given by the district court, a separate instruction on good faith was unnecessary. See *Pomponio*, 429 U.S. at 13 (because "[t]he trial judge * * * adequately instructed the jury on willfulness," "[a]n additional instruction on good faith was unnecessary"); *Cheek*, 498 U.S. at 201. Furthermore, the court of appeals correctly held that, "taken together, the trial, charge, and closing argument laid the theory of the defense squarely before the jury, and the lack of the requested instruction did not seriously impair [petitioner's] ability to present effectively his good-faith defense." Pet. App. A25.

b. Neither *Mathews*, *supra*, nor *United States* v. *Murdock*, 290 U.S. 389 (1933), on which petitioner relies (Pet. 23-24), requires a separate instruction on good faith in this case. In *Mathews*, the Court held that, "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. at 63. *Mathews*, however, involved the affirmative defense of entrapment, and it relied on other cases involving affirmative defenses, such as self-defense. See *id.* at 63-64 (discussing, *inter alia*, *Stevenson* v. *United States*, 162 U.S. 313 (1896)). The instant case does not involve an affirmative defense, and, as already discussed, the willfulness instruction adequately covered petitioner's defense.

In *Murdock*, the defendant, who had invalidly asserted the Fifth Amendment privilege when questioned by a revenue agent, was prosecuted for willfully failing to supply information. 290 U.S. at 391, 393. This Court held that the defendant was entitled to the following instruction: "If you believe that the reasons stated by the defendant in his refusal to answer questions were

given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful." *Id.* at 393. Nothing in the Court's opinion, however, indicates that the substance of the instruction the defendant sought was otherwise covered by an instruction on willfulness. To the contrary, the trial court in *Murdock* gave instructions that effectively took from the jury "the question of absence of evil motive."[2] *Id.* at 396. The conclusion that *Murdock* does not require a separate good-faith instruction is supported by *Pomponio*, in which the Court discussed willfulness, cited *Murdock*, and ruled that a separate good-faith instruction was *not* required. *Pomponio*, 429 U.S. at 12.

c. Most courts of appeals have held, in accordance with *Pomponio* and *Cheek*, that it is not reversible error to refuse to give a separate good-faith instruction if the jury is adequately instructed on specific intent. See *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990);[3] *United States* v. *Evangelista*, 122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998);[4] *United States* v. *Gross*, 961 F.2d 1097, 1103-1104 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Storm*, 36 F.3d 1289,

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[2] The Court subsequently held, in *Pomponio*, 429 U.S. at 12, that "evil motive" or bad purpose is merely a description of the willfulness requirement in this context—"a voluntary, intentional violation of a known legal duty." *Ibid.*

[3] See also *United States* v. *McGill*, 953 F.2d 10, 12-13 (1st Cir. 1992); *United States* v. *Coast of Maine Lobster Co.*, 557 F.2d 905, 909 (1st Cir.), cert. denied, 434 U.S. 862 (1977).

[4] See also *United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990).

1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995);[5] *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982); *United States* v. *Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000);[6] *United States* v. *Dorotich*, 900 F.2d 192, 193-194 (9th Cir. 1990); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

The two circuits that petitioner cites (Pet. 22) as requiring a separate instruction on good faith even if the jury receives a proper willfulness instruction—the Second and the Eleventh—have abandoned or modified previous decisions requiring such an instruction. Compare *United States* v. *Regan*, 937 F.2d 823 (2d Cir. 1987), amended, 946 F.2d 188 (2d Cir. 1991), cert. denied, 504 U.S. 940 (1992), with *Evangelista*, 122 F.3d at 118-119 n.6 (noting that in *Regan*, the court "held that a general good-faith charge 'was insufficient to instruct the jury concerning appellants' specific good faith defense' in the circumstances of *that* complex case, 'where appellants were charged with sixty-four counts covering the waterfront of tax fraud, securities fraud, mail and wire fraud, conspiracy, and RICO.' 937 F.2d at 826-27," and holding that "*Regan* does not control this case, where the Evangelistas simply defaulted on a direct and unambiguous obligation to pay $1.5 million in payroll taxes"); *United States* v. *Morris*, 20 F.3d 1111, 1115 (11th Cir. 1994), with *Walker*, 26 F.3d at 110 (holding that "court's

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[5] See also *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990); *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986).

[6] See also *Willis* v. *United States*, 87 F.3d 1004, 1008 (8th Cir. 1996); *United States* v. *Sanders*, 834 F.2d 717, 719 (8th Cir. 1987).

instruction to the jury on intent to defraud adequately addressed the concept of good faith").

Only a circuit that petitioner fails to mention—the Tenth Circuit—has articulated and not yet disavowed the proposition that it is reversible error not to give a separate good-faith instruction where a good-faith defense is raised. See *United States* v. *Harting*, 879 F.2d 765 (1989). The *Harting* decision is erroneous. First, the Tenth Circuit erred in concluding, 879 F.2d at 770, that "the failure to instruct the jury regarding good faith constitutes error under *Mathews*." As already discussed, *Mathews* held that a defendant was entitled to a separate instruction on an affirmative defense, not that a defendant was entitled to a separate instruction basically restating an element of the offense in terms of absence of proof of the element. The Tenth Circuit also erred in concluding that "a close reading of *Pomponio* reveals ambiguity" and that the precedent on which *Harting* was grounded was "consistent with the substance, if not the language, of *Pomponio*." *Id.* at 769. *Pomponio* unambiguously held that because "[t]he trial judge * * * adequately instructed the jury on willfulness," "[a]n additional instruction on good faith was unnecessary." 429 U.S. at 13.

Although the Tenth Circuit erred in *Harting*, further review is not warranted to address the conflict between that decision and the decision in this case. Most courts of appeals have held that it is not reversible error to refuse to give a separate instruction on good faith if the other instructions, taken as a whole, adequately convey the essence of a defendant's good-faith defense by explaining the government's burden of proving specific intent. And like the other circuits that once required a separate good-faith instruction, the Tenth Circuit may

reconsider its position. There is thus no need for this Court to resolve the differences in approach between the court of appeals in this case and the Tenth Circuit. Indeed, this Court has repeatedly denied review in cases raising the same issue that is presented by petitioner here. See, *e.g.*, *Lewis* v. *United States*, 534 U.S. 814 (2001) (No. 00-1605); *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518); *Gross* v. *United States*, 506 U.S. 965 (1992) (No. 92-205); *Green* v. *United States*, 474 U.S. 925 (1985) (No. 84-2032).

3. Petitioner asks the Court to review his sentence, asserting that this case presents the question "whether a bare showing of relevance of a person's political associations (as support) and beliefs (as a motive) for the crime of conviction is sufficient under the Constitution to justify a doubling of his sentence." Pet. 26-27.

The district court did not rely solely on petitioner's beliefs and associations in concluding that petitioner was likely to recidivate and that a stricter sentence was therefore warranted. The court also relied on the fact that petitioner's "beliefs have led him to act in a manner inconsistent with the laws of the United States (ranging from giving up his driver's license, threatening to kill federal judges, and failure to comply with the federal tax laws)." Pet. App. A33. The court thus relied on petitioner's conduct (including his threat) in imposing sentence.

In any event, because petitioner's beliefs and associations were highly relevant to the likelihood of recidivism, the district court permissibly relied on them in determining the appropriate sentence. In *Dawson* v. *Delaware*, 503 U.S. 159, 165 (1992), this Court held that "the Constitution does not erect a *per se* barrier to the

admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." The Court explained that "[i]n many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society[;] [a] defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future." *Id.* at 166.

The district court considered petitioner's beliefs and associations for precisely the purpose identified as permissible in *Dawson*: as support for the conclusion that "it is likely that [petitioner] will commit future tax-related crimes." Pet. App. A33. That conclusion was well supported. Although he had already spent more than six months in pretrial detention, petitioner advised the district court during the sentencing hearing that he still "firmly believed" that "the wages of a laborer are withheld through fraud" and that it was "fundamental law" that the "wages of employees" were exempt from tax. *Id.* at A42. The district court accordingly permissibly concluded that the likelihood of recidivism was such that an upward departure was warranted. In any event, that fact-bound determination would not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2006

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No. 05-948

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD M. SIMKANIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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April 2006

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ARGUMENT IN REPLY

Richard M. Simkanin has petitioned this Court for a writ of certiorari to review the judgment and opinion of the Fifth Circuit. The petition presents three questions worthy of this Court's review. The Brief in Opposition ("Br.Opp.") refuses to address the first and third questions presented, instead reframing them to remove any features that make the questions interesting.[1] On the second Question Presented -- whether a bare bones jury instruction on "willfulness" in a tax case suffices to place a "good faith" (*Cheek*) defense before the jury -- the respondent concedes a split in the Circuits, but nevertheless denies that certiorari should be granted. The petition explains in detail why the writ should be granted in this case on any or all of the issues presented. The respondent fails to persuade otherwise.

1. This Court should address the question whether a jury instruction which, over objection, takes an elemental fact away from the jury in a criminal case can be disregarded as harmless. To resolve the question correctly, it may be necessary to overrule *Neder v. United States* (1999).

The court below held that petitioner Simkanin was not unconstitutionally deprived of his right to jury trial

[1] The respondent proposes a revision of the Questions, Br. Opp. (i), to make them seem fact-bound and case-specific, and the matter accordingly less worthy of this Court's attention. The Questions Presented in the Petition, of course, are the ones the Court would and should address if the writ is granted.

by the district court's repeated instruction that told the jury that the trial judge had determined as a legal matter a fact which was necessary to conviction. (The fact in question was that petitioner's company, Arrow Custom Plastics, was an "employer" that paid taxable wages to "employees" and that Arrow "through its responsible officials, had a legal duty to collect by withholding from the wages of its employees, the employees' share of social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay the withheld amounts to the United States of America." CA5 RE12:14.) The respondent asserts that the court below was right in concluding that the jury could not have taken the judge to mean what he said, and that the Sixth Amendment was thus not violated. Even if there was a constitutional violation, the government continues, it was harmless. Not only are those contentions incorrect, but they also do not address the question whether certiorari should be granted.

The respondent simply ignores most of petitioner's arguments showing that the court of appeals disregarded this Court's precedents in deciding that the contested jury instruction did not in effect direct a verdict. Directly contrary to the Fifth Circuit's approach in this case, this Court requires consideration of whether the jury might have taken the instructions to incorporate the error. The petition shows this is quite possible. *Compare* Pet. 14-16 *with* Br.Opp. 10-11. The petition therefore squarely presents the question whether this Court should revisit the notion of harmless error in the context of a judge's taking away part of the jury's constitutional function. The petition invites the Court

to construe narrowly or even overrule its decision in *Neder v. United States*, 527 U.S. 1 (1999). The respondent completely ignores the heart of the petition in that respect, contending only (as if the case were still being argued in a court of appeals) that the error was, in its view, "harmless."[2] Whether a harmless error rule properly can apply goes unanswered by respondent. The petition presents an important Sixth Amendment jury trial question which is ripe for certiorari consideration[3]; the respondent's desire to limit proceedings in this Court to a rehash of the direct appellate process should be rejected.

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[2] The government never even forthrightly acknowledges that harmlessness, if an allowable showing at all, must be established beyond a reasonable doubt. And it repeats the inaccurate assertion of the court below that the government's flimsy evidence on this score was "uncontradicted," Br.Opp. 12, *quoting* Appx. A20, without responding in any way to the petitioner's showing that the evidence was both dubious and disputed. *See* Pet. 19-20.

[3] At very least, the petition should be held for consideration in light of the disposition of *Washington v. Recuenco*, No. 05-83, which presents a closely related Sixth Amendment harmless error question.

2. This Court should rejected the respondent's suggestion that it refrain from resolving the split in the Circuits on the need for a "good faith" instruction in tax cases. The courts of appeals need this Court's guidance on the significance, after *Cheek* (1991), of the Court's comment on this point in *Pomponio* (1976).

The respondent concedes there is a split in the Circuits on a tax defendant's entitlement to an instruction on good faith, even though the court has told the jury the definition of "willfulness." Compare *United States v. Harting*, 879 F.2d 765, 767-70 (10th Cir. 1989), *with* Appx. A21-27 *and cases cited in* Br.Opp. 15-16 (citing circuits which disavow need for separate "good faith" instruction). In *United States v. Pomponio*, 429 U.S. 10 (1976) (per curiam), this Court asserted: "The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary." That comment was quoted in *Cheek v. United States*, 498 U.S. 192, 201 (1991), and has misled several of the circuits, including the court below. This Court's intervention is required.

After *Cheek*, it is all the more important that the Court clarify the holding of *Pomponio*. One sentence from that 1976 *per curiam* -- which is of course binding on all lower federal courts -- was misapplied in the court below so as to strip all significance from the important holding 15 years later in *Cheek*. As the Tenth Circuit aptly noted in *Harting*, the trial court in *Pomponio* had in fact instructed the jury quite specifically on the inconsistency between a conclusion of willfulness and crediting the defendant's asserted belief in the earlier

case (that his draw was a loan and not income). 879 F.2d at 770, citing *Pomponio*, 429 U.S. at 13 n.4. Thus, the instruction that was deemed "adequate" in *Pomponio* was not, as at petitioner's retrial, a bare bones statement of the abstract definition of willfulness, but rather a specific application of that definition to the asserted defense. In other words, a "theory of the defense" instruction was given in *Pomponio* to cover the question of "good faith." See *United States v. Mathews*, 485 U.S. 58, 63 (1988). *Pomponio* therefore cannot legitimately be cited as a justification for refusing a good faith instruction in a case where, as here, the trial court gave no pertinent instruction other than the most minimal, technical definition of willfulness.

In short, there is a split in the circuits, and the division of opinion results from confusion concerning the import and interrelationship among several of this Court's cases. It would be difficult to posit a stronger case for a grant of certiorari on a non-constitutional question.

3. The First Amendment violation in the doubling of petitioner's sentence cannot be avoided by pointing to conduct.

Petitioner's sentence was greatly increased because of his "membership in a group with radical views" and his "professed beliefs." Appx. A43. The court below saw no First Amendment problem. The respondent now unabashedly cites the depth of petitioner's commitment to a moral posture at odds with the income tax system as a lawful justification for treating him as a hardened

criminal. Br.Opp. 19. These troubling suggestions should be explored on certiorari.

Respondent points repeatedly to the sentencing court's one reference to "conduct," rather than belief, cited as the fourth of five reasons, as a contributing factor to the upward departure sentence. The district court thus referred to petitioner's "contempt and disrespect for the laws of the United States of America, the State of Texas, and the city of Bedford," Appx. A32, including "giving up his driver's license, threatening to kill federal judges, and failure to comply with the federal tax laws." Appx. A33. The third of these, of course, is the basis for the current conviction, and the first is hardly a matter of significance. Only the second warrants discussion at all. But under the Sentencing Reform Act, the petitioner's alleged "contempt" for authority and so-called "threats" to kill a judge were the basis for an "obstruction of justice" enhancement under USSG § 3C1.1. The same conduct could not lawfully justify any upward departure at all, 18 U.S.C. § 3553(b), a point entirely ignored by the court below. Nor did the sentence enhancement have any persuasive factual foundation.[4] The respondent's suggested reasons for

[4] The respondent also seemingly endorses the court of appeals' references to Judge McBryde's reliance on highly unreliable evidence of a single "threat" expressed some 18 months earlier. Appx. A33 n.16; 420 F.3d at 415 n.16. The sole factual basis for this was an agent's testimony at petitioner's detention hearing about an interview with a disbarred California lawyer who (the agent said) claimed to have been in a conversation with petitioner and one other person, at a dinner. The agent said the informant told him

avoiding the fundamental issue presented in the petition are thus illusory.

The record shows that the overriding basis for the increase in petitioner's sentence was judicial antipathy to his stated beliefs, masquerading as a concern about recidivism. The First Amendment demands a more serious analysis of whether the courts below disregarded this Court's admonition that "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993). The importance of the constitutional question cannot be ignored. A writ of certiorari should be granted.

_____(cont'd)

the meeting prior to the dinner "was called by a guy named Jim Davenport"; it ran "from like 9:00 to 5:00, and there were many individuals there." Another participant in the day's meeting, however, testified that only eight people attended, that the meeting lasted about 3½ hours, and that he arrived "a little bit late ... at about ... 6:30 p.m." By Motion to Modify Terms of Pretrial Release, after conducting a full investigation, counsel for petitioner proffered witness statements and documentary evidence contradicting nearly every detail of the informant's story, as recounted by the agent. The district court denied this motion without a hearing. Order, 12/23/03. No one else ever claimed petitioner "threatened" violence of any kind, or that he (or anyone associated with him) took any steps to carry out any such "threat" or any similar conduct. For this unsubstantiated accusation to keep coming back against petitioner when he was denied the opportunity to present the evidence he had collected showing it to be false is grossly unfair.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 14, 2006.